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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARIO JIJON, Defendant and Appellant.	B286925 (Los Angeles County Super. Ct. No.NA104300)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed in part, remanded in part with directions.

Stanley D. Radtke, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant Mario Jijon guilty of premeditated attempted murder and assault with a deadly weapon after he slashed a man's neck at a bus stop. Defendant challenges his conviction on appeal, asserting that there was insufficient evidence of premeditation, that the court should have offered a sua sponte jury instruction on the lesser included offense of voluntary manslaughter, and that his counsel was ineffective for failing to request a pinpoint instruction as to provocation. We disagree and affirm the judgment of conviction.

Defendant also asserts that the case should be remanded for resentencing under recent changes to Penal Code section 667, subdivision (a). The Attorney General agrees that defendant's sentence is available for reconsideration. We therefore remand to allow the trial court to exercise its discretion under Penal Code section 667, subdivision (a).

FACTUAL AND PROCEDURAL BACKGROUND

The Los Angeles County District Attorney (the People) filed an information charging defendant with one count of attempted murder (Pen. Code, §§ 187, subd. (a), 664, count 1)[1] and one count of assault with a deadly weapon, a knife (§ 245, subd. (a)(1), count 2)). As to count 1, the information alleged that the offense was premeditated, and in the commission of the offense defendant personally used a deadly weapon, a knife. (§§ 664, subd. (a), 12022, subd. (b)(1).) As to count 2, the information alleged that defendant personally inflicted great bodily injury upon the victim. (§ 12022.7, subd. (a).) The information also

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

alleged that defendant had prior convictions. Defendant pled not guilty and the matter proceeded to trial.

At trial, Angel N.[2] testified that at 11:20 p.m. on May 27, 2016, he and his father, Alfonso Q., were in Long Beach, seated at a bus stop waiting for a bus. A man with a black sweatshirt and a balloon also arrived at the bus stop; at trial, Angel identified him as defendant. Another man was there as well; he was wearing a white jacket and had white hair in "dreads." Angel and Alfonso were having a conversation, and defendant was talking to himself and "agreeing with everything we were saying." Defendant asked Alfonso, "Where are you from?" Alfonso responded, "I'm a Mexican mother fucker." Defendant backed away as if his feelings were hurt.

Defendant then said to the man in white, "These guys are pissing me off, you know." The man in white said, "I have two knives. What do you want to do?" Defendant responded, "Nah, nah, nah. It's cool." Angel testified, "[A] minute later, the guy with the hoodie and the balloon comes out of nowhere and stabs my dad in the neck." Defendant stabbed Alfonso from behind with his left hand. Defense counsel asked the jury to observe that defendant only had two fingers on his left hand.

Angel testified that about 10 or 15 minutes passed between the time he noticed defendant at the bus stop and the stabbing. On cross-examination, Angel testified that defendant and the man in white were talking for about three minutes before the man in white walked away and defendant stabbed Alfonso. Defense counsel asked for clarification: "Q. So it's fair to say in total between the time when this person arrived, was having a

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[2]We refer to the victims by first names to protect their privacy. (See Cal. Rules of Court, rule 8.90(b)(4).)

conversation with another person, and the time that your dad was stabbed, about three minutes passed? Is that right?" Angel replied, "Yeah."

After the stabbing, Defendant "walked off towards the gas station behind the bus stop." Angel took Alfonso by the arm and went across the street to a 7-Eleven. Angel called 911, and a recording of the call was played for the jury. On the call, Angel reported his location and said his father had been stabbed in the neck. Angel said the perpetrator was "still here, he's across the street." Angel reported that the perpetrator was Hispanic, about age 35, and wearing all black. Angel described the direction in which defendant was walking. The police later took Angel to where they had apprehended a suspect, and Angel identified defendant as the perpetrator.

Witness Jimmie Parker testified that on the night of May 27, 2016, he was on his 10th floor balcony overlooking the intersection where the incident occurred. He "heard a lot of yelling starting at the 7-Eleven." He "saw a guy grab his neck and fall to his knees, and the other people were yelling at this guy that was walking away." The man who was walking away was "kind of short, [and] had on all black." The man walked down the street, turned the corner toward an alley, "placed something in the tree," and continued walking. He stopped to talk to some people and "he got a bag – white bag and some balloons." When police arrived at the scene, Parker went downstairs and told officers that he had seen the man put something in a tree. They went over to the tree and discovered a box cutter in the tree.

Long Beach Police Department officer Lisa McCourt testified that when she responded to the scene of the incident,

Parker approached her and said he had seen what happened. Parker said the man in black had a single birthday balloon. Parker also showed her where the man stopped by a tree, and "there was a box cutter in the tree." McCourt's partner retrieved the box cutter and booked it into evidence.

Long Beach Police Department officer Benjamin Cobb testified that on the night of the incident, he was dispatched to search for a suspect who was "a male Hispanic wearing a black sweatshirt, black pants, holding a plastic bag and a birthday balloon." He located a suspect that matched that description, whom Cobb identified as defendant. Cobb and his partner took defendant into custody. Another officer brought a witness over for a field showup to identify the suspect. On cross-examination, Cobb testified that he did not notice blood on defendant's hands or clothing.

Alfonso Q. testified that he and Angel were at the bus stop on the night of May 27, 2016. A man approached from behind and asked Alfonso if he "was an Indian." Without turning around, Alfonso answered, "No. I'm a Mexican mother fucker." Alfonso and Angel resumed talking to one another, and "suddenly" the other man "comes from my back and cut my neck."

The man then ran toward a nearby alley and vacant gas station. Alfonso did not see the man during the attack, but "I see this shadow, tall skinny, but I don't see his face." The prosecutor asked, "When you say tall and skinny, are you referring to the shadow that you saw?" Alfonso answered, "Just from the shadow, I can tell that." Alfonso testified that "he was wearing something – something large, I mean, like a white jacket or white coat. I don't know, but I see white shadow, tall and skinny." On cross-examination, Alfonso said he never saw the attacker's face, but

he thought the person was tall and wearing a white shirt or jacket. On redirect, Alfonso said that his impression that the person was tall was based on "the individual's shadow." Alfonso grabbed his neck to stanch the flow of blood, and told Angel to call an ambulance. An ambulance arrived and took Alfonso to the hospital; the wound required thirteen staples and left a scar.

The prosecution rested. Defendant submitted Alfonso's medical records as evidence, and rested. The parties briefly addressed jury instructions, and agreed to the instructions with no objections. The jury found defendant guilty of attempted murder, count 1, and found true the allegations that the crime was premeditated, that defendant personally used a knife, and that defendant inflicted great bodily injury on Alfonso. The jury also found defendant guilty of assault with a deadly weapon, count 2, and found true the allegation that defendant inflicted great bodily injury on Alfonso. Following a bench trial, the court found true the allegations as to defendant's prior convictions. The court sentenced defendant to 23 years to life on count 1, and stayed the sentence for count 2. Defendant appealed.

DISCUSSION

A.

Defendant contends that the premeditation sentencing enhancement should be stricken because it is not supported by sufficient evidence of deliberation and premeditation. He asserts that "no rational jury could have found" that defendant had a premeditated intent to kill Alfonso. Defendant argues that instead, the evidence makes clear that the stabbing was a "rash impulse hastily executed."

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in

the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) "'We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.] Thus, we presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.'" (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

"'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly."'" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

Here, the evidence made clear that there was a pause between Alfonso's statement and the stabbing, in which defendant considered taking action in response to Alfonso's statement. After Alfonso spoke to defendant, defendant backed away as if his feelings were hurt, and told the other man that Alfonso and Angel were making him angry. When the man in white said he had knives, defendant said, "Nah, nah, nah. It's cool," but within minutes he slashed Alfonso's neck. Angel testified that at least three minutes passed between Alfonso's response and the stabbing, while the other men talked. This evidence was sufficient to allow the jury to reasonably find that

defendant weighed considerations in forming the course of his actions.

Defendant notes that the Supreme Court stated in *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, that "[t]he type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories": planning activity, motive, and a preconceived design to take the victim's life in a certain way. Defendant argues that deliberation was not sufficiently proven because the *Anderson* factors were not present here. As the Supreme Court has cautioned, however, "*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) Thus, "[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate." (*People v. Thomas* (1992) 2 Cal.4th 489, 517.)

Even measured by the *Anderson* factors, however, the evidence supports a finding of deliberation. Angel testified that defendant appeared to be offended by Alfonso's statement, and defendant told the man in white that Alfonso was "pissing me off," thus allowing for the inference that defendant's anger at Alfonso was a motive. Planning activity was suggested by defendant's conversation with the man in white, in which the man suggested that defendant could use knives to "do" something about the fact that Alfonso had angered defendant. Although defendant seemed to reject the suggestion that action should be taken, the evidence showed that he then armed himself and approached Alfonso from behind, thus allowing for an inference that defendant created a plan to attack Alfonso by surprise. In

addition, defendant slashed Alfonso's neck, resulting in a wound that ultimately required 13 staples, allowed for an inference that defendant planned to take Alfonso's life by cutting an extremely vulnerable part of his body. Slashing of a victim's throat may be evidence of a preconceived design to kill. (See *People v. Elliot* (2005) 37 Cal.4th 453, 471.) We therefore find that the jury's finding of premeditation was supported by substantial evidence.

B.

Defendant asserts that the trial court erred by not sua sponte instructing the jury on the lesser included offense of attempted voluntary manslaughter. He argues that the evidence supports a finding that defendant acted in the heat of passion or in response to a sudden quarrel. "[O]n appeal we employ a de novo standard of review and independently determine whether an instruction on the lesser included offense of [attempted] voluntary manslaughter should have been given." (*People v. Manriquez* (2005) 37 Cal.4th 547, 584 (*Manriquez*).)

Voluntary manslaughter is "the unlawful killing of a human being, without malice" "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) "Although section 192, subdivision (a), refers to 'sudden quarrel or heat of passion,' the factor which distinguishes the 'heat of passion' form of voluntary manslaughter from murder is provocation." (*People v. Lee* (1999) 20 Cal.4th 47, 59.) Thus, "[a]n unlawful killing is voluntary manslaughter only 'if the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment."'" (*People v.*

Thomas (2012) 53 Cal.4th 771, 813.) "'Adequate provocation must . . . be affirmatively demonstrated.'" (*Ibid*.)

The heat of passion requirement has both an objective and a subjective component. (*Manriquez, supra*, 37 Cal.4th at p. 584.) Objectively, the "'"heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances."'" (*Ibid*.) Thus, to establish that heat of passion was caused by provocation under the objective standard, "such provocation 'must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment.'" (*Manriquez, supra*, 37 Cal.4th at pp. 585-586.)

The objective standard has not been met here. Even if Alfonso's statement could be interpreted to mean that Alfonso called defendant a "mother fucker," a single slur in the absence of any other provocative conduct would not cause an average, sober person to lose reason and judgment. In *Manriquez, supra*, the victim "called defendant a 'mother fucker' and . . . also taunted defendant, repeatedly asserting that if defendant had a weapon, he should take it out and use it." (*Id*. at p. 586.) The Supreme Court held that these statements "plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment." (*Ibid*.) The evidence here—a single statement and no additional interaction before the stabbing—was not sufficient to support a finding that objectively, Alfonso's statement was sufficient provocation to warrant a heat-of-passion finding under section 192, subdivision (a).

"An instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser,

uncharged offense but not the greater, charged offense." (*People v. Thomas*, supra, 53 Cal.4th at p. 813.) Here, because the evidence could not support a finding under the objective heat of passion requirements, that standard has not been met. The trial court's failure to give the instruction was not error.

Moreover, even if we were to assume for the sake of argument that substantial evidence justified an instruction on attempted voluntary manslaughter, reversal is not warranted. "The failure to instruct on a lesser included offense in a noncapital case does not require reversal 'unless an examination of the entire record establishes a reasonable probability that the error affected the outcome.'" (*People v. Thomas*, *supra*, 53 Cal.4th at p. 814.) Here, the jury found true the allegation that the attempted murder was willful, deliberate, and premeditated, and we have found that substantial evidence supports that finding. This finding "negate[s] any possibility that defendant was prejudiced from the failure to instruct on provocation/heat of passion." (*People v. Cruz* (2008) 44 Cal.4th 636, 665.)

C.

Defendant asserts that his counsel was ineffective for failing to request a pinpoint instruction on the subjective test for provocation. Defendant argues that his counsel should have requested an instruction to consider provocation under a subjective standard, which could negate premeditation. As noted above, the heat of passion standard requires an objective element to reduce malice murder to voluntary manslaughter. On the other hand, "a subjective test applies to provocation as a basis to reduce malice murder from the first to the second degree: it inquires whether the defendant in fact committed the act because he was provoked. The rationale is that provocation may negate

the elements of premeditation, deliberateness and willfulness that are required for that degree of the crime." (*People v. Jones* (2014) 223 Cal.App.4th 995, 1000; see also *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333.)

"Reviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions." (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) In addition, the conviction must be upheld unless the defendant demonstrates that but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Ibid.*)

The Attorney General asserts that the record reveals no reasoning for the attorney's actions, and therefore the conviction must be affirmed. Defendant appears to agree that the attorney's reasoning is not reflected in the record, but contends that "it simply made no sense not to ask for an instruction on unreasonable subjective provocation" in light of the evidence presented. The record does not indicate counsel's reason for failing to request a pinpoint instruction. We disagree with defendant's interpretation that there is no satisfactory explanation for the omission.

Because the jury was instructed with CALCRIM 601, regarding the standards for premeditation and deliberation, defendant's trial counsel may have reasonably concluded that the existing instruction was sufficient and an additional instruction

on provocation was unnecessary. In addition, defense counsel acknowledges on appeal that "[t]he sole defense presented by [defendant's] trial attorney was that he was not the person who stabbed Alfonso." Thus, trial counsel could have concluded that an instruction on provocation would have increased the focus on defendant as the assailant, which would have undermined the main defense of mistaken identity. Thus, we are not persuaded by defendant's assertion that there could be no reasonable basis for defense counsel's failure to request a pinpoint instruction.

Moreover, defendant has not demonstrated that the failure to include such an instruction was prejudicial. The jury was given full and proper instructions, including an instruction on premeditation and deliberation, and found that defendant's actions were premeditated. As discussed above, this finding is supported by substantial evidence. Evidence of provocation—a single statement by Alfonso and no additional interaction—was extremely weak. On the other hand, there was ample evidence that defendant considered the course of action he would take next, discussing his anger with the man in white, waiting several minutes, then approaching Alfonso from behind to slash his neck. Defendant has not established that a pinpoint instruction on subjective provocation was warranted in light of the evidence presented, or that the result of the proceeding would have been different had counsel requested such an instruction. Thus, reversal is not warranted on the basis that counsel was ineffective.

D.

"On September 30, 2018, the Governor signed S.B. 1393 which, effective January 1, 2019, amends sections 667(a) and 1385(b) to allow a court to exercise its discretion to strike or

dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the [previous] versions of these statutes, the court [was] required to impose a five-year consecutive term for 'any person convicted of a serious felony who previously has been convicted of a serious felony' (§ 667(a)), and the court ha[d] no discretion 'to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.' (§ 1385(b).)" (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.)

Defendant asks that this matter be remanded to allow the court to exercise its discretion under the amended version of section 667, subdivision (a). The Attorney General recognizes that defendant's sentence is eligible for reconsideration.[3] We therefore remand to allow the court to exercise its discretion as provided in section 667, subdivision (a).

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[3]In its brief filed November 1, 2018, the Attorney General asserted that defendant's claim was not ripe because the changes implemented by S.B. 1393 were not yet effective. That argument is now moot.

DISPOSITION

The case is remanded for the trial court to exercise its discretion under Penal Code section 667, subdivision (a). In all other respects, the judgment is affirmed.

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COLLINS, J.

We concur:

MANELLA, P. J.

DUNNING, J*

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* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.